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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LARRY EUGENE PAGE, Defendant and Appellant.	H041765 (Santa Clara County Super. Ct. No. 187213)

I. INTRODUCTION

In 2000, defendant Larry Eugene Page was convicted of five felony offenses and was sentenced to indeterminate terms of 25 years to life for each count, pursuant to the Three Strikes law. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12.)[1] In 2013, defendant filed a petition for a recall of his sentence (§ 1170.126, subd. (b)) under the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)). The trial court denied his petition, and defendant now appeals.

Defendant contends that remand is required because the trial court erroneously denied his petition as to *all* of his current convictions on the grounds that *one* of his current convictions was a serious or violent felony. The Attorney General appropriately

[1] All further statutory references are to the Penal Code unless otherwise indicated.

concedes this point. We will therefore reverse trial court's order and remand the matter to the trial court.

II. BACKGROUND[2]

A. Convictions, Sentence, and Direct Appeal

Based on a series of crimes committed with three codefendants in 1995 and 1996, defendant was charged with a number of offenses, including: conspiracy to commit criminal threats, assault by means of force likely to produce great bodily injury, and extortion (§ 182, subd. (a)(1); count 1); extortion (§§ 518-520; count 2); attempted driving or taking a vehicle (§ 664, Veh. Code, § 10851; count 5); first degree burglary (§§ 459-460, subd. (a); count 16); assault with a deadly weapon or by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); count 17)[3]; and first degree robbery (§ 213, subd. (a)(1)(A); count 18). The indictment alleged that defendant was armed with a firearm in the commission of count 5 (§ 12022, subd. (a)(1)), but that allegation was stricken during defendant's trial.

Defendant was convicted of counts 1, 5, 16 and 17 (conspiracy, attempted driving or taking a vehicle, first degree burglary, and assault) and, in count 18, of attempted robbery (§§ 664/213, subd. (a)(1)(A)) as a lesser included offense. He was found not guilty of count 2 (extortion). Defendant admitted two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§§ 667, subd. (a), 1192.7).

Defendant was sentenced to an indeterminate term of 100 years to life, consecutive to a six-year determinate term. The indeterminate term was comprised of

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[2] This court granted judicial notice of the record on appeal in *People v. Gomez et al.* (Feb. 14, 2003, H021587) [nonpub. opn.]. Some portions of the background have been taken from the prior opinion.

[3] In count 17, the indictment charged defendant with "assault with a deadly weapon or by means likely to produce great bodily injury" (capitalization omitted) but specifically alleged that defendant "did commit an assault upon the person of [the victim] by means of force likely to produce great bodily injury."

consecutive terms of 25 years to life for counts 2, 5, 17, and 18, and the determinate term included a one-year term for the arming enhancement (§ 12022, subd. (a)(1)) originally alleged as to count 5. The trial court stayed the terms for counts 1 and 16 pursuant to section 654.

After defendant appealed from his convictions and sentence, this court modified the judgment by: (1) ordering the term imposed for count 2 stricken; and (2) ordering the one-year arming enhancement stricken. The trial court subsequently issued an amended abstract of judgment reflecting the modifications, which resulted in an indeterminate term of 75 years to life consecutive to a five-year determinate term.

B. Petition for Recall of Sentence

On November 22, 2013, defendant filed a pro per petition for recall of sentence pursuant to section 1170.126, subdivision (b). Defendant sought resentencing on count 2 (extortion) and count 5 (attempted driving or taking a vehicle).

The trial court denied defendant's petition in an order filed on December 5, 2013, reasoning that defendant was ineligible for resentencing because one of his current convictions—his first degree burglary conviction (count 16)—was a serious felony. (See §§ 1170.126, subds. (e)(1), 1192.7, subd. (c)(18).)

Defendant filed a notice of appeal from the trial court's order and sought relief from default. This court granted the motion.

III. DISCUSSION

In *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), the California Supreme Court held that section 1170.126 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Johnson, supra,* at p. 688.) Under *Johnson,* the trial court erred by

denying defendant's petition as to all of his convictions based on the fact that his first degree burglary conviction was a serious felony.

Defendant contends he is eligible for resentencing on count 5 (attempted driving or taking a vehicle) because the arming allegation associated with that count was stricken and because the evidence in the record compels a finding that he was *not* armed in the commission of that offense. (See §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Defendant contends that he is *potentially* eligible for resentencing on count 17. As defendant acknowledges, that determination depends on issues such as whether the assault was committed with a deadly weapon (see § 1192.7, subds. (c)(23) & (c)(31)) and whether the trial court has discretion to impose the term of 25 years to life for the burglary (count 16), which was originally stayed pursuant to section 654.

We will remand this matter to the trial court for consideration of defendant's arguments as to his eligibility for resentencing on counts 5 and 17. We note that even if one or more of defendant's convictions is eligible for resentencing, the trial court may still deny defendant's petition if it finds that resentencing him "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Defendant contends that when determining his eligibility for resentencing, the trial court may not engage in "judicial factfinding" and is limited to considering "the bare elements" of the convictions. He argues that the trial court is precluded from making "post hoc" determinations about the conduct underlying his prior convictions, based on principles in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Shepard v. United States* (2005) 544 U.S. 13 (*Shepard*), and *Descamps v. United States* (2013) 570 U.S. ___, 133 S.Ct. 2276 (*Descamps*).

As several courts have concluded, "[*Apprendi*] and its progeny do not apply to a determination of eligibility for resentencing under section 1170.126." (*People v. Johnson* (2016) 244 Cal.App.4th 384, 390, fn. 6; *People v. Osuna* (2014) 225 Cal.App.4th 1020,

1039-1040; see also *People v. Berry* (2015) 235 Cal.App.4th 1417, 1428 [finding of ineligibility for resentencing does not expose defendant to any potential increase in his sentence]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1060 (*Blakely*), quoting *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 [U.S. Supreme Court " 'opinions regarding a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening law' " such as proceedings to determine whether the petitioner satisfies the criteria in section 1170.126, subdivision (e)]; cf. *Dillon v. United States* (2010) 560 U.S. 817, 828-829 [no Sixth Amendment right to jury in downward sentence modification proceeding].)[4]

We follow the reasoning of the above cases and conclude that the trial court's determination of defendant's eligibility for resentencing does not implicate the holdings of *Apprendi*, *Shepard*, or *Descamps.* Thus, the trial court is not limited to considering "the bare elements" of the convictions; the court may consider "the record of conviction." (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338; cf. *Blakely, supra,* 225 Cal.App.4th at p. 1063 [existence or nonexistence of disqualifying factors is determined by court's examination of "relevant, reliable, admissible portions of the record of conviction"].)

IV. DISPOSITION

The December 5, 2013 order denying defendant's petition for resentencing is reversed. On remand, the superior court is directed to appoint counsel for defendant to represent him on his petition.

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[4] This court's opinion in *People v. Wilson* (2013) 219 Cal.App.4th 500 (*Wilson*), cited by defendant, is inapposite. In *Wilson,* this court held that a trial court's resolution of a factual issue—whether the offense involved personal infliction of great bodily injury—violated the defendant's Sixth Amendment rights under *Apprendi.* (*Wilson, supra,* at p. 515.) In that situation, however, the trial court's finding was used to *increase* the defendant's sentence.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.